

# **SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE PATH FORWARD**

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There is a rich history in context of same-sex relationships in India. While there are dissenting voices, an analysis of ancient Indian texts and scriptures reveals a more progressive society than one created in the post-colonial India. The introduction of criminal punishment for same-sex relationships was owing to the British who drafted the Indian Penal Code. Section 377, criminalised such relationships with imprisonment and fine, thereby creating a hostile environment for such people. The social structure in India did not contribute in facilitating this vulnerable section. With the advent of the 21<sup>st</sup> century and due to global movements against the discriminatory attitude and subjugation, India too faced a similar uprising. Finally, with the landmark Navtej Johar case, the Supreme Court of India decriminalised same-sex relationships and with the privacy judgement, provided a strong foundation for the community to advance their rights and identity. However, even with the judicial pronouncement, there are sections

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within the legislative bodies who continue to oppose the idea of same-sex relationships, which is clearly reflected in a case before the Delhi High Court. In light of the above, the paper shall be a doctrinal analysis of the LGBTQ movement in India. The main focus shall be on the judicial perspective and the contribution of the Supreme Court in analysing and providing a liberal interpretation to protect the interests of this marginalised group. The paper shall also dwell on the recent developments, specifically in terms of the question of marital rights vis-à-vis the case before the Delhi High Court and what could possibly be the future course of action in India.

***Keywords: same-sex, LGBTQ rights, Navtej Johar, privacy, India***

## **INTRODUCTION**

The term 'LGBTQ' refers to a wide spectrum of people who fall outside the heteronormative understanding of gender and sex. There is no conclusive definition of the term and therefore the acronym is often used with '+' sign to signify that the collective is not exhaustive. The term though, stands for lesbian, gay, bisexual, transgender and queer. It refers to both aspects of sexuality and gender. While gay, lesbian, bisexual are sexual preferences of persons; transgender is a gender who does not identify with the binary of male and female genders. The term 'queer' is broadly used to signify the 'queerness' of the collective. Other terms like intersex, asexual etc., all fall within the term. It is a complex term which requires an understanding of gender and sexuality as aspects of human life. The heteronormative standard which has become the default are questioned by this collective and is aimed towards identifying their own identities in the spectrum of gender and sexuality.

The LGBTQ community has come a long way in terms of social acceptance globally. In India, the struggle has been a lengthy one with the judiciary coming to the rescue of the community. The Indian legal system, based on the English law, had by law oppressed sexual minorities under the now repealed Section 377 of the Indian Penal Code. The clause which defined *unnatural offences* applied to members of the LGBTQ community and created an environment of fear, oppression and violence by society in general and also by the police force. The decision of the Supreme Court resulted in a major step forward towards normalising the idea of sexual minorities in India and has provided a legal foundation for the community. Transgender persons are in a better position owing to their recognition as the third gender, though the legal enactment drafted for them has been subjected to much criticism. Sexual minorities have been

systematically oppressed and have been forced to live a life in anonymity. There is a clear lack of understanding and discrimination may be observed in many different forms; namely, transgender persons are not included in social organisation and are denied work or employment; there are no guaranteed rights of marriage, reproduction or adoption/maintenance for same sex couples etc among others. However, even after the decriminalisation, social rights are denied, and one among them which is before the courts in India, is marriage rights of same-sex couples. This is the obvious next step for the community to ensure a normal life but the consistent opposition by the government has made it extremely challenging.

## **INTERNATIONAL PERSPECTIVE**

LGBTQ rights, at the international level, has been restricted mostly at the level of individual nations rather than at a supra-national level. The United Nations has not drafted any specific convention on the subject. However, it has led the discussion towards removing the stigma and inherent bias against the community by virtue of campaigns and programmes. The United Nations Free & Equal campaign is one such example of advocacy calling for equal rights and fair treatment for the LGBTQ spectrum worldwide.

The lack of consensus and varying degrees of acceptability of this community has made the process of uniformity quite challenging for the United Nations. In many nations, same-sex relations are frowned upon and is punishable as a criminal offence, in some cases, with the likelihood of life imprisonment and capital punishment. One particular attempt which was made in the year 2006 was the meeting in Yogyakarta to address the concerns of the community. Many prominent non-governmental organisations, leading activists and academics met in Yogyakarta, Indonesia and drafted the historic Yogyakarta Principles. This document laid down principles aimed towards the human rights relating to sexual orientation, gender identity, gender expression and sex characteristics. These Principles not only provide a host of different rights for the community but also imposes certain obligations on the state to implement the rights. In the year 2017, this was revised and a new document, Yogyakarta Plus 10 was drafted and adopted which provided some additional rights and responsibilities for the states to ensure that the community can break free from the discriminatory nature and be treated equally and with basic dignity and respect.

## **THE INDIAN EXPERIENCE**

India, at its core, is a conservative nation. India is a secular nation which safeguards for all freedom to practice, profess and propagate any religion of choice. Being religiously inclined, many facets of society and personal laws are based on faith. This also includes aspects regarding same-sex relationships. An analysis of the history of same-sex relationships reveals an interesting picture of a transition from an open, liberal society to a conservative one. This was aided by legal sanction introduced by the British in India via the Indian Penal Code, specifically Section 377. This provision made such relationships punishable with imprisonment and fine, thereby creating an atmosphere of domination and discrimination against same sex couples. The journey of subsequent decriminalisation took decades, eventually being addressed in 2018 with the Navtej Johar case.

Historically, there have been many references to same-sex relations and transgender persons in the various kingdoms in India. The Vedic times and Hindu scriptures, art and architecture reflects the idea of gender fluidity.<sup>2</sup> Some of the most prominent examples include Valmiki's Ramayana which refers to Hanuman seeing rakshasa women kissing in Lanka<sup>3</sup>; the birth of King Bhagirathi; the temples of Khajuraho, Ellora caves in Maharashtra and Sun Temple in Kornak and the well-known text, Kama Sutra, which deals with sexuality, eroticism and emotional fulfilment of life, authored by Vatsyayana.<sup>4</sup>

The temples of Khajuraho are a leading example of the tolerance of the community in the past.<sup>5</sup> These temples were built between 950-1050AD by the Chandela dynasty. The sculptures in the temples are carved with illustrations of same-sex relations, including an open depiction of exposed men and women erotically embracing each other with sexual fluidity. The Sun temple in Kornak exhibits similar images.<sup>6</sup> The Ellora caves which depict the life of Gautam Budha, the founder of Buddhism, also have such paintings portraying men and women in same-sex intercourse. These various examples exemplify the existence of a liberal society, one without

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<sup>2</sup> Ray S, "Indian Culture Does Recognise Homosexuality, Let Us Count the Ways" *The Quint* (September 11, 2018) <<https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377>> accessed December 5, 2021.

<sup>3</sup> Desk ITW, "Homosexuality in Ancient India: 10 Instances" (*India Today*, July 10, 2018) <<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>> accessed December 5, 2021.

<sup>4</sup> In the chapter titled, 'Auparishtaka', gay men have been referenced in context of oral sex. Homosexual men assumed a passive role and were referred to as 'mukhebhaga' or 'asekya'.

<sup>5</sup> Pandey BV, "Why Legalising Gay Sex in India Is Not a Western Idea" (*BBC News*, December 31, 2018) <<https://www.bbc.com/news/world-asia-india-46620242>> accessed December 5, 2021.

<sup>6</sup> Nair SS, "Life360" (*Life360*, November 28, 2019) <<https://jomec.co.uk/life360-2019/uncategorised/religion-has-always-been-the-biggest-tool-to-create-taboo-in-india>> accessed December 5, 2021.

judgement and which openly depicted them in such prominent and respectable places such as a temple.

In Islamic literature, Baburnama is the most prominent example of a text referring to same-sex attraction.<sup>7</sup> There are Sufi poets such as Sufi Saint Bulleh Shah, Sarmand Kashani etc., are some prominent writers that have exhibited such references.<sup>8</sup>

With the advent of the British empire in India, the societal and legal standards changed with a more anglicised understanding of society. The ideas of western thought, which were particularly determined by the Church, were imposed in the Indian system. The legal structure in India was a creation of British and with the drafting of the Indian Penal Code by Lord Macaulay, homosexuality became a criminal offence.

This legal regulation ran parallel to the social infusion of moral right and wrong and the perception of it being immoral. Morality with the religious interpretation of life after death resulted in the society questioning such practices and clearly depriving them of any civility and humanity. This outlook was ingrained in society and even after independence, the legal system retained the Indian Penal Code and with-it Section 377. The British, who introduced such a provision in the legal sphere, repealed the provision in their own nation in 1967 but in India, the struggle continued till 2018.

## **JUDICIAL REVIEW OF LGBTQ RIGHTS IN INDIA**

A judicial analysis of LGBTQ rights in India reveals that while the legislature has been on the backfoot on this matter, the judiciary has been quite proactive in the last few years. Specifically, in the last decade, many important judgements were decided by the Supreme Court which paved way for recognition of basic rights of this marginalised group. The failure of the lawmakers in this regard reflects the conservative nature of the Parliament which had to be addressed by a liberal judiciary. The following are some of the most prominent judgements of the Supreme Court on the subject.

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<sup>7</sup> Salam ZU, "An Emperor with Foibles" *The Hindu* (February 15, 2014) <<https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece>> accessed December 5, 2021.

<sup>8</sup> Khalid H, "From Bulleh Shah and Shah Hussain to Amir Khusro, Same-Sex References Abound in Islamic Poetry" *Scroll.in* (June 17, 2016) <<https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amir-khusro-same-sex-references-abound-in-islamic-sufi-poetry>> accessed December 5, 2021.

### *Naz Foundation v Government of NCT Delhi*

In this landmark case<sup>9</sup>, the Delhi High Court declared Section 377 of the Indian Penal Code as unconstitutional. Based on a Public Interest Litigation filed by the NGO, the judgement paved way for the legal review of the British era law. The Court declared it to be in violation of Article 14, Article 15 and 16 (all rights around the concept of equality) of the Constitution of India.

### *NALSA v. Union of India*<sup>10</sup>

This case came in the aftermath of the criticised judgement in Suresh Kumar Koushal v. Union of India<sup>11</sup>. In Suresh Kumar, the Supreme Court re-criminalised Section 377, which was decriminalised in Naz Foundation. The National Legal Services Authority led the charge towards raising relevant questions in favour of the transgender community. This judgement declared transgender persons as the third gender. A comprehensive set of guidelines, protecting the rights and freedoms of the transgender community, was laid down in the judgement. Subsequent to that, legislative developments followed to provide a clear statute that shall forward their rights. There were extensive debates and versions of law presented which culminated in 2019 with the Transgender Persons (Protection of Rights) Act, 2019. While the law is necessary and does have some positive aspects, it has a major issue, i.e., of administrative interference by requiring that each person would have to be recognized as 'transgender' on the basis of a certificate of identity issued by a district magistrate. This is a major issue considering the sensitivity of the subject.

### *Justice (Retd.) K. S. Puttaswamy v. Union of India*

Granting the right to privacy as a facet of Right to Life and Liberty, Article 21, this judgement held that privacy is an integral part of a human's life and that it extends to all individuals, notwithstanding gender and sex.<sup>12</sup> In the judgement, Justice Chandrachud observed that the LGBTQ community should be entitled the right to privacy, particularly autonomy and freedom from interference from the state. A special observation was made in context of the right to choose partners of one's own choice, sexual freedom and autonomy. The Court observed that, *"The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on grounds of sex) and*

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<sup>9</sup> 160 Delhi Law Times 277. (India)

<sup>10</sup> AIR 2014 SC 1863. (India)

<sup>11</sup> Civil Appeal 10972 of 2013. (India)

<sup>12</sup> AIR 2017 SC 4161. (India)

21 (right to life and personal liberty) of the Constitution.” This judgement was the primary precursor to the breakthrough Navtej Johar case.

*Navtej Singh Johar v. Union of India*<sup>13</sup>

This judgement decriminalised homosexuality in India by reading down the infamous Section 377. Striking down the section to the extent that it criminalised consensual intercourse between two consenting adults, the judgement held that the section violated Articles 14, 15, 16 and 19(1)(a) of the Constitution. The right to live with dignity, the freedom to autonomy and choice in personal life were recognised, drawing inspiration from the Puttaswamy judgement.

*Abhijit Iyer Mitra case*

The matter pertains to the question of recognition of same sex marriage under the Hindu Marriage Act and the Special Marriage Act in India. The argument forwarded by the petitioner is that with the recognition of same sex relationships consequent to the decriminalisation; the state should be responsive to the cause and also conform to the international standard and conventions that India is a signatory to. Contradicting this argument, Solicitor General Tushar Mehta argues that the term ‘*spouse*’ under Hindu law can include only a male and female and that such judicial interference will ‘*cause complete havoc with the delicate balance of personal laws*’.<sup>14</sup> The central government stated that the decriminalisation of Section 377 did not automatically mean that such relationships would be entitled the right to marry. Referring to the Indian traditions and that marriages are based on rituals, ethos and social values, marriages have a spiritual aspect to it and thus, such same-sex marriage rights cannot fall within the purview of the judicial adjudication; but it a matter for the government and legislature to review and determine.<sup>15</sup>

## THE PATH FORWARD

A clear legislative enactment is the need of the hour that addresses the numerous legal rights that should be protected and safeguarded along with clear directions and recommendations to

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<sup>13</sup> AIR 2018 SC 4321. (India)

<sup>14</sup> Ojha P, “Same-Sex Marriage Is Not a Fundamental Right :Delhi HC” (*LAW TIMES JOURNAL*, February 25, 2021) <<https://lawtimesjournal.in/same-sex-marriage-is-not-a-fundamental-right-delhi-hc/>> accessed December 5, 2021.

<sup>15</sup> The Tribune India, “Same-Sex Marriages Not Recognised by Our Laws, Society and Our Values: Centre to Delhi HC” *The Tribune India* (September 14, 2020) <<https://www.tribuneindia.com/news/nation/same-sex-marriages-not-recognised-by-our-laws-society-and-our-values-centre-to-delhi-hc-141139>> accessed December 5, 2021.

states in India to implement the law. This should also include the right to marriage under the Indian Special Marriage Act, 1954. The foundation of this law and the inspiration may be the Yogyakarta Principles and Yogyakarta Plus 10. This was the first major legal document created by a working group in Indonesia. This document is an extremely fruitful one that addresses the concerns of the community from a human rights perspective and it based on the core notion of equality and freedom.

The next possible solution, which is desperately needed in the Indian context, is engagement with the LGBTQ community. This should begin with a more open- and broad-minded discussion on sex and sexuality within families and communities. Participation of the community in the mainstream is critical. Privacy should be respected and protected. The fact that one is gay, or a lesbian does not affect the society. It is the sexual preference of a person and thus, as rightly observed in the Puttaswamy judgement, *“equality demands that sexual orientation of each individual be protected on an even platform”*. To that end, what is needed is training and sensitization programmes. The first misconception that is needed to be addressed is it is a matter of choice and not of biology. Many such misconceptions exist in the community and these need to be addressed with relevant programmes.

Education should be disseminated at all levels, starting with schools as a part of sex education. It should be taught sincerely and without engulfing it in shame or discernment. Another critical sector is the police and law enforcement. Indian police are not known to be sensitive and there are cases of abuse and violence in the hands of the police against the community.

## **CONCLUSIONS**

It is time to acknowledge that there exists a community within us who conform to a different sexual preference than heterosexuals and that sexual preference is only one aspect of their existence. They are as human as any other heterosexual human being. Social engagement aimed towards inclusion should be the focus. This should be normalised, and the idea of shame should be eradicated. There is no need to be offended by one’s choice of sexual partners, it is a personal preference. A clear statute can be extremely effective not only in bringing about a sense of uniformity in legal protection in relation to social, economic and cultural rights but it will surely provide an avenue to ensure justice. A legislative enactment will empower them to question instances of abuse, violence and discrimination and that will give them a voice, which is critical.